IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE RESPONSE TO**
v.	)	**GOVERNMENT MOTION FOR**
	)	**PRELIMINARY**
MANNING, Bradley E., PFC	)	**DETERMINATION OF**
U.S. Army, (b) (6) [redacted]	)	**ADMISSIBILITY OF EVIDENCE**
	)	**(COMPUTER-GENERATED**
	)	**RECORDS)**
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 17 AUGUST 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this court to deny the Government's motion for a preliminary determination as to the admissibility of computer-generated evidence.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Government has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010).

4. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32 Investigating Officer. The charges were referred on 3 February 2012.

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WITNESSES/EVIDENCE

5. The Defense does not request any witnesses be produced for this motion.

LEGAL AUTHORITY AND ARGUMENT

6. The Defense objects to the admission of the Government's Enclosures to its Motion for Preliminary Determination on Admissibility of Evidence dated 3 August 2012 because they are testimonial hearsay falling outside the scope of M.R.Es 803(6) and 902(11).

I. The Enclosures Are Hearsay Because They Contain Statements by the Computer User

7. R.C.M. 801(a) defines a statement as either "an oral or written assertion" or "nonverbal conduct of a person." Here, the Enclosures in question contain the statements of a computer user(s). That is, the Enclosures contain written assertions and nonverbal conduct by the user(s) of various computers.

8. The Government relies heavily on the decision in *U.S. v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010) to suggest that the Enclosures in question are machine-generated. There, the court was concerned with the amount of human intervention in the creation of the record. *Id.* at 224. Although, the Government noted this in its motion, it failed to actually address the amount of human intervention involved in the creation of each record it seeks to admit. Rather, the Government simply made the blanket assertion that the Enclosures are computer-generated. It would seem the Government is arguing that because the records were kept on a computer, document computer activity and a computer was used to print the record, the record must be "computer-generated." Following the Government's rationale to its logical conclusion would leave ridiculous results. For example, a printed copy of this motion would not amount to hearsay because it was created using a computer, stored on a computer and printed using a computer; never mind the fact that a user had to input all the data that the computer "generates."

9. The Enclosures the Government seeks to admit involve significant human intervention and cannot be considered "wholly machine-generated." Unlike the urinalysis reports the Government attempts to analogize, here the data the Government seeks to pre-admit amounts to a statement by the computer user. With a urinalysis report, the computer creates a record out of whole cloth; it takes a sample, analyzes it and produces data. Here, the Enclosures are records of searches actually typed in by a user of the computer. But for the user typing the exact phrases, names and terms, and conducting the various actions documented[1], the record the Government seeks to admit would not exist. Thus, it is clear that the amount of human intervention in the creation of these records is significant. It must follow that the records containing those exact phrases, names and terms are a statement by the user.

10. Because the Enclosures contain out of court statements from the user(s) of various computers and the Government seeds to offer them for the truth of the matter asserted, the

[1] Be it opening a file, creating a file, visiting a website, typing a search or any other user conduct that is memorialized in the Enclosures.

Government must point to a hearsay exception. Absent such an exception the Enclosures should not be admitted.

II. The Enclosures Are Testimonial Hearsay Pursuant to *Crawford*

11. Additionally, the reports themselves are testimonial hearsay. M.R.E. 803(6) establishes an exception to the general rule against hearsay where records are kept in the course of "regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation., all as shown by the testimony of the custodian or other qualified witness, or be certification that complies with M.R.E. 902(11)."

12. Despite this exception to the prohibition against hearsay, a business record must also satisfy the 6th Amendment's Confrontation Clause. The Court in *Crawford v. Washington* established that where testimonial hearsay is at issue the Confrontation Clause is only satisfied is the Accused is afforded an opportunity for cross-examination. 541 U.S. 36, 59 (2004). The *Crawford* Court defined testimonial hearsay further as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51.

13. C.A.A.F's ruling in *U.S. v. Rankin*, 64 M.J. 348 (2007), is instructive on what amounts to testimonial hearsay in the military context. There, the court established a three-part test for identifying testimonial hearsay:

> (1) was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry; (2) did the statement involve more than a routine and objective cataloging of unambiguous factual matters; and (3) was the primary purpose for making, or eliciting, the statement the production of evidence with an eye toward trial.

Id. at 352.

14. The C.A.A.F. in *U.S. v. Harcrow*, applied the Rankin factors when considering whether laboratory reports created upon request by the county sheriff were testimonial. 66 M.J. 154 (2008). In considering the Confrontation Clause issue, the court noted, "[h]ere the laboratory tests were specifically requested by law enforcement and the information relayed on the laboratory reports pertained to items seized during the arrest of an identified 'suspect.'" *Id.* at 159. The court further held, "lab results or other types of routine records may become testimonial where a defendant is already under investigation, and where the testing is initiated by the prosecution to discover incriminating evidence." *Id.* (quoting *U.S. v. Magyari*, 63 M.J. 123 (2006)).

15. Similarly, the Coast Guard Court of Criminal Appeals applied the Rankin Factors in determining statements in a cover memorandum were testimonial. *U.S. v. Byrne*, 70 M.J. 611 (2011). In *Byrne*, the court found the Confrontation Clause had been violated when a "Laboratory Document Packet" regarding an alleged positive urinalysis was admitted over defense objection. In weighing the *Rankin* factors the Court noted, "we find the statements in the

cover memorandum were made in response to a request for a litigation packet, which clearly indicates that a court-martial is being contemplated, and, thus, the memorandum was prepared in response to a prosecutorial inquiry." *Id.* at 614.

16. In the case at hand, the Government seeks to introduce Enclosures that are testimonial in nature. Specifically, the Government's Enclosures fall outside the scope of 803(6) and 902(11) because they were made in preparation for trial. In each instance, the record contained in the various Enclosures was created at the behest of the Government. That is, they did not exist in the present form until the Government requested them with an eye towards trial. Because they were made in preparation for trial they are testimonial in nature and, pursuant to *Rankin* and the 6th Amendment, should not be admitted at this time.

CONCLUSION

17. Based on the above, the Defense requests that the Court deny, in part, the Government's motion to pre-admit evidence under R.C.M. 902(11).

Respectfully submitted,

JOSHUA J. TOOMAN
CPT, JA
Defense Counsel